IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: ONYANGO OTIENO, VISRAM & KOOME, JJ.A)

CIVIL APPLICATION NO. NAI. 248 OF 2011 (UR. 161/2011)

BETWEEN

AFRICAN SAFARI CLUB LIMITED …….…… APPLICANT

AND

1. COMMISSIONER OF POLICE

2. PERMANENT SECRETARY IN CHARGE OF INTERNAL SECURITY

3. BISAM SECURITY COMPANY LIMITED

4. BUSINESS LIAISONS COMPANY LIMITED

5. JUMA KIPLENGE

6. MR. SUNGUT, DEPUTY OCPD KISAUNI

7. JAMES MARUK, OCS BAMBURI ……..... RESPONDENTS

(An application for injunction pending the hearing and determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Mombasa (Okwengu, J) dated 2nd August, 2011

in

H. C. Petition No. 35 of 2011)

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RULING OF THE COURT

African Safari Club Limited, ***the applicant*** herein, comes before us under ***Rule 5 (2) (b)*** of the Rules of this Court, and under ***sections 3, 3A*** and ***3B*** of the Appellate Jurisdiction Act, seeking the following substantive orders:

"(c) The Court be pleased to issue preservatory and conservatory orders restraining the 3rd, 4th and 5th Respondents by themselves of their officers, juniors, agents, servants and/or employees from getting into or remaining upon Plot Nos. MN/I/5902, MN/1/856, un-surveyed plot at Shanzu Mombasa reference number 31500/XII/108 on Plan No. 122149/22A upon which is built the Flamingo Beach Hotel Mombasa and a workshop and offices in use by the Petitioner until the hearing and determination of this Application.

(d) The Court be pleased to issue preservatory and conservatory orders restraining the 3rd, 4th and 5th Respondents by themselves or their officers, juniors, agents, servants and/or employees from getting into or remaining upon Plot Nos. MN/I/5902, MN/1/856, un-serveyed plot at Shanzu Mombasa reference number 31500/XII/108 on Plan No. 122149/22A upon which is built the Flamingo Beach Hotel Mombasa and a workshop and offices in use by the Petitioner until the hearing and determination of the intended appeal.

(e) The Court be pleased to order the 3rd, 4th and 5th Respondents by themselves, their juniors, servants, employees and/or agents to forthwith leave and vacate Plot Nos. MN/1/5902, MN/1/856, un-surveyed plot at Shanzu Mombasa reference number 31500/XII/108 on Plan No. 122149/22A upon which is built the Flamingo Beach Hotel Mombasa and a workshop pending the hearing and determination of the intended appeal.

(f) In the alternative to prayer (c) above the Court be pleased to issue a mandatory injunction reinstating the Appellant to Plot Nos. MN/1/856, , un-surveyed plot at Shanzu Mombasa reference number 31500/XII/108 on Plan No. 122149/22A upon which is built the Flamingo Beach Hotel Mombasa and a workshop pending the hearing and determination of the Petition."

At the hearing of the application, Mr. Kinyua Kamundi, learned counsel for the applicant, conceded, and it is common ground, that the applicant is not in possession of the suit property, having been evicted in June, 2011. Accordingly, the first three substantive prayers are in vain, and the thrust of Mr. Kamundi's argument was therefore based on the 4th prayer, a mandatory injunction **"to reinstate the applicant to the suit property"**. Although this Court has original jurisdiction under ***Rule 5 (2) (b)*** to consider the prayer sought, we must note at the outset that it was not a prayer sought before the High Court, and we do not have the benefit of the High Court's pronouncement on the same. Nonetheless, we shall consider the same, noting that the onus is on the applicant to satisfy the court, firstly, that the intended appeal is arguable, and secondly, that unless we grant the prayer, the intended appeal, if successful, will be rendered nugatory. The applicant must satisfy both of those principles (see ***Githunguri vs Jimba Credit Corporation Ltd (No. 2) [1988] KLR 838*****).**

What is the background to this application"

The dispute relates to the ownership of the suit property, which is presently registered in the name of the 4th respondent. The applicant claims that it purchased the same in the name of the 4th respondent on the understanding that its shares would eventually be transferred to the applicant or its nominee. On the other hand, the 4th respondent claims that it acquired the property from Ezekiel Bargetuny and Philomena Chelagat, the original allottees, for a price of Kshs.404,810/=, and then entered into a 15 year lease agreement with the applicant, which agreement required the applicant to construct a hotel within one year, and then to set off the cost of construction over the 15 year lease period. The agreement also

provided for the renewal of the lease for a further five years. The 4th respondent claims that it simply re-possessed its property upon the expiry of the main lease, and upon the applicant's failure to apply for renewal.

Clearly, that is the main dispute which needs resolution by the High Court. The issue before us, at this time, is whether we should grant a mandatory injunction reinstating the applicant to the property to which they lost possession some 18 months ago, and where Mr. Kamundi admits, there has been re-construction going on, following a fire that engulfed part of the property.

Based on those facts, is this a proper case for the grant of a mandatory injunction" Mr. Kamundi's main argument before us was that the applicant's constitutional rights to ownership of property, and to fair trial, were violated when the respondent, in collusion with the police, evicted it irregularly and unlawfully, and sought this Court's intervention to reinstate the applicant to the suit property.

On the other hand, Mr. Buti, learned counsel for the 3rd, 4th and 5th respondents argued that the prayers sought had been overtaken by events, and to grant a mandatory injunction at this interlocutory stage would in fact result in a final order, with nothing further to determine in the appeal. Ms. Ruth Lutta, learned counsel for the 1st, 2nd, 6th and 7th respondents concurred with Mr. Buti's submissions.

In declining to grant the "conservatory orders" sought by the applicant, the learned Judge of the High Court (as she then was) stated:

"It is evident the orders sought by the petitioner appear to be akin to an order of mandatory injunction. This is because the orders would have the effect of removing the respondents from the suit premises and although not specifically sought, reinstating the applicant into the premises. In my view a conservatory or preservatory order is intended to preserve the subject matter of the suit. At the end of the day, the parties should not only be able to have their day in court, but also the main suit should not be rendered nugatory. Neither the applicant nor the respondent should be prejudiced by the issuance of the conservatory order.

In the circumstances of this case, the position at the moment is that the applicant has been removed from the suit premises. An order restraining the respondents, its staff or agents from getting into or remaining upon the suit property; or an order directing the respondents to forthwith leave and vacate the suit property; is not an order for preserving the status quo. It is an order for reinstating the status quo ante i.e the position before the alleged breaches occurred. It would be premature and prejudicial for the court to issue such an order at this stage. Thus the applicant had not satisfied this court that the conservatory orders it is seeking are necessary to preserve the subject matter of the suit."

That is the gist of the ruling that is the subject of an intended appeal.

We have considered the application, the affidavit in support thereof, the submissions of counsel and the authorities placed before us. The Petition to determine ownership of the suit property is still pending in the High Court and we make no comments on the same. The application that fell for consideration before the High Court sought certain conservative orders pending the hearing of that Petition, and as we have noted, the learned Judge declined to grant the same because they had been overtaken by events, and also because the prayer for mandatory injunction had not been sought.

We think, for our part, the Judge was alive to the principles applicable in considering prayers for grant of conservatory orders. With respect to the prayer for mandatory injunction sought before us, in this

application, we would once again wish to outline the principles that the courts have relied on in the past authorities.

In the case of ***East African Fine Spinners Ltd (In Receiveship) & 3 Others vs Bedi Investments Ltd Civil Appl. Nai. 72 of 1994 (ur)*** Gicheru, JA (as he then was) cited Megarry, J (as he then was) in ***Shepherd Homes Ltd vs Sandahm [1971] 1 ch. 34***, stating in part:

"……., it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation. If, of course, the defendant has rushed on with his work in order to defeat the plaintiff's attempts to stop him, then upon the plaintiff promptly resorting to the court for assistance, that assistance is likely to be available; for this will in substance be restoring the status quo and the plaintiff's promptitude is a badge of the seriousness of his complaint." (emphasis added).

Megarry, J. continued:

"The matter is tempered by a judicial discretion which will be exercised so as to withhold an injunction more readily if it is mandatory than if it is prohibitory. Even a blameless plaintiff cannot as of right claim at the trial to enforce a negative covenant by a mandatory injunction. Second, although it may not be possible to state in any comprehensive way the grounds upon which the court will refuse to grant a mandatory injunction in such cases at the trial, they at least include the triviality of the damage to the plaintiff and the existence of a disproportion between the detriment that the injunction would inflict on the defendant and the benefit that it would confer on the plaintiff. The basic concept is that of producing a "fair result," and this involved the exercise of a judicial discretion. Third, on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction." (emphasis added).

Referring to the application of those principles, this Court in ***Kenya Airports Authority vs Paul Njogu Muigai & 2 Others Civil Application No. Nai. 29 of 97 (ur)*** said:

"An order which results in granting a major relief claimed in the suit, which may not be granted at final hearing, ought not to be granted at an interlocutory stage. Again referring to the principle in the Shepherd Homes case (supra) as adopted in the case of Locabaill International Finance Ltd. vs. Agroexport [1986] 1 ALL E.R. 901 Mustil LJ said at page 906:

'The matter before the court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case. I feel bound to say that, to my way of thinking, this was not the approach adopted by the judge because, as I understand the position, a specific argument was not directed at the hearing before him to the level of conviction which required to be conveyed to the court before a mandatory injunction could properly be granted.'

So that in the final analysis, as regards principles governing the grant of a temporary mandatory injunction the passage in Halsbury's Laws of England volume 24 paragraph 948 is germane to the issues before us and it would bear setting it out. It reads:

'A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notices that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application.'" (emphasis added)

We have found it necessary to go into some detail on the legal principles and their application because they are the self-same principles we have to apply in exercise of our original jurisdiction here and also because we are skeptical about the arguability of the applicant's intended appeal. It is, of course, the applicant's right to pursue the intended appeal and upon the appellate court to pronounce itself finally on that appeal. In our view, granting the mandatory injunction sought at this stage would leave nothing further to await in the intended appeal and we are not inclined to do so. We are also of the view that the success of the intended appeal will not be rendered nugatory.

In all the circumstances we decline to grant the order sought and we order that this motion be and is hereby dismissed with costs.

Dated and delivered at Mombasa this 24th day of January, 2013.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR